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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 12

UNITED STATES OF AMERICA, *Petitioner,*

v.

APPALACHIAN ELECTRIC POWER COMPANY,
Respondent.

BRIEF OF THE STATE OF WEST VIRGINIA, AMICUS CURIAE

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JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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PRELIMINARY STATEMENT

This suit involves specifically the question whether jurisdiction over the development of the water power (and perhaps other) resources of New River shall remain with the States in which that stream is situated or shall, against the will of those States, be transferred to the Federal Government. Nevertheless there is at stake the broad principle of whether States shall continue to exercise jurisdiction to determine when, how, and by what means all their natural internal resources shall be

developed for their own best interests and for the best interests of their people. New River is in part situated within the boundaries of West Virginia and the vital interest of this State, both in the specific question involved and in the broad principle at issue, is hardly subject to exaggeration.

It had never occurred to the State of West Virginia and its officials that there ever could be challenge of the full and complete sovereign power to regulate the development of the water power resources of New River and other State waters in such manner, short of interference with interstate navigable waters, as it deems for the best interests of the State and its people. However, in 1931 it came to the attention of the State that the Federal Power Commission was asserting jurisdiction to determine whether, and if so on what conditions, the water power resources inherent in New River could be developed and was asserting that such water power resources could not be developed under the license and jurisdiction of the States within which the river is situated but only under a license issued by the Commission in complete disregard of State power and State policy. From the time when this controversy was created by such contention of the Federal Power Commission up to the present, the position of the State of West Virginia has been clear and unwavering, both upon questions of jurisdiction and upon the factual issues which underlie them. For example, the State, through its Governor, protested against the Federal Power Commission taking jurisdiction of the Radford project (10 Annual Report F. P. C. 153) and, by the attorney for the West Virginia Public Service Commission, appeared in opposition to that jurisdiction at the public hearing held by the Federal Power Commission on February 16-17, 1931 (11 Annual Report F. P. C. 124).

By reason of the State's asserting

> "a right superior to that of the United States to license the use of the New and Kanawha Rivers for the production and sale of hydroelectric power."

and denying

> "the right of the Federal Power Commission to require a license for the construction and operation of the Hawks Nest Project [located on the river below Hinton] by the corporate defendants"

and asserting

> "that in so far as the Federal Water Power Act purports to confer upon the Federal Power Commission authority to license the project or to control the use of the river by the corporate defendants, the act is an invasion of the sovereign rights of the state and a violation of the Constitution of the United States."

the United States, by an original bill filed January 14, 1935, sought (albeit unsuccessully) to bring suit against the State of West Virginia in this Court. *United States v. West Virginia et al.*, 295 U. S. 463, 469.

The State of West Virginia has, through its legislature and Public Service Commission, exercised jurisdiction over water power development on the New River and has done so to the exclusion of the Federal Government (Chapter 115, Acts 1933, Reg. Sess.; P. U. R. 1929-B, pp. 215-18).

The State of West Virginia appeared as *amicus curiae* in this suit in the District Court of the United States for the Western District of Virginia and similarly appeared in the Circuit Court of Appeals for the Fourth Circuit when the appeal was before that Court.

The course of this controversy and the facts involved are fully detailed in the opinion of the District Court and have been dealt with at length by the majority opinion of the Circuit Court of Appeals, so that here only some of the pertinent matters which demonstrate how vital the outcome of this litigation is to the interests of the State of West Virginia will be referred to and discussed.

The State of West Virginia includes within its boundaries a large area in the higher altitudes of the Alleghany Mountains which is the source of numerous non-navigable streams flowing into the Kanawha, Ohio, Monongahela and Potomac Rivers, and because of the precipitous nature of the country which they traverse many of such streams have a rapid fall capable of producing extensive water power. Accordingly there are within the boundaries of the State water powers in numerous streams including the New River which are largely undeveloped at this time and are of great value to the State and its citizens.

The State of West Virginia has fostered a policy promoting and encouraging the development of the hydro-electric energy latent in its streams. As far back as February 21, 1913, an Act was passed by the Legislature of West Virginia, for the purpose of providing for the development of water power, which declared that:

> "All water streams within the state capable of generating electrical or other energy or power shall be under the control and supervision of the state",

subject only to the rights of the riparian owners (Acts 1913, Chapter 11). This Act was amended and reenacted by the Water Power Act of 1915 (Acts 1915, Chapter 17). A subsequent water power act enacted by the Legislature of West Virginia in 1929, although declared constitu-

tionally void by reason of a technical defect in the prescribed administrative procedure, nevertheless set forth the same policies on the part of the State.

The West Virginia Power Act of 1915 above referred to authorized the production and sale of hydroelectric or other power by domestic corporations only; defined and regulated the powers, rights, duties and obligations of such companies under permits to be issued by the State for a period not to exceed fifty years; provided for the reversion after such period to the State and the people thereof of all rights and powers under such permits; provided for the purchase of the project by the State on the payment of the value of the improvements; and provided for the payment of certain annual royalties to the State. The Act further provided for the regulation by the State of the building, maintenance and operation of dams across its [water] streams and of all structures, works and property used in connection therewith and the regulation of accounting practices, of rates charged for electricity and of security issues. This Act expressly asserted the sovereign authority of the State over all such streams.

The New River rises in the mountains of northwestern North Carolina and enters Virginia at her southern boundary. It then flows through the State of Virginia, a distance of approximately 125 miles, pursuing first an easterly or northeasterly direction and then turning abruptly it follows a northwesterly course into the State of West Virginia. In the State of West Virginia it continues in a northwesterly direction for some 90 miles until it unites with the Gauley River to form the Kanawha which continues in the same direction for about 90 miles until it flows into the Ohio River at Point Pleasant, West Virginia.

Respondent's project consisting of a dam and generating plant, the subject of this litigation, is located several miles above Radford, Virginia, and some 60 miles above the State of West Virginia.

THE CONTENTIONS OF PETITIONER

The contentions of the petitioner are *first*, that respondent's project is located in navigable waters of the United States; *second*, that, if not so located, its construction and operation would impair the navigable capacity of navigable waters of the United States; and *third*, that, in either situation, it could not be constructed and operated without a *standard* license under the Federal Power Act.

THE INTERESTS OF WEST VIRGINIA

The interests of the State are involved both directly and indirectly. It is apparent not only that it is the policy of the State of West Virginia to foster and protect the development of its rivers similar to New River, but that it has been vigilant to protect its interest in New River itself against any encroachment by the Federal Government, and that it has asserted its plenary jurisdiction over that part of the New River within its borders which is involved in this litigation. Moreover, development of the power resources of the river in accordance with the terms of the Federal Water Power Act not only would deprive the State of its jurisdiction in the premises but would as well threaten, if not actually result in, the loss of very valuable subjects of taxation and revenue.

The application of the provisions of the Federal Water Power Act to projects like this Radford project on New River would retard, if not prevent, developments of that kind in West Virginia, with the consequent loss of reve-

nue, employment and other benefits; it would also serve as a dangerous precedent for thwarting the policy of the State and infringing its sovereignty.

In the latter connection the State of West Virginia is vitally interested in retaining the rights reserved to her by the Tenth Amendment of the Constitution of the United States and in opposing unconstitutional encroachments of Federal authority in general, the complete substitution of Federal bureaucratic control and the unlawful whittling away of the powers of the States. These disturbing tendencies have been growing during recent decades and have now reached an alarming stage. Actually, *despite its steadily increasing exercise of power* during the past quarter of a century, it is significant to note that the Federal Government, during that entire period, *has obtained from the States an additional grant of power on one occasion only.*

In exercising authority steadily extending in scope it apparently has chosen to usurp the reserve powers of the States rather than to seek additional grants of power through Constitutional amendment. The State of West Virginia firmly believes that the point has been reached where the preservation of American Constitutional government makes it imperative that usurpation be abruptly halted.

THE FINDINGS AND OPINIONS OF THE COURTS BELOW

Not only are the findings of the District Court based upon substantial evidence, but contrary findings, with respect to the navigability of the river and the effect of the construction and operation of respondent's project (as to all of which petitioner had the burden of proof), could find no substantial basis in the record. Moreover, the Circuit Court of Appeals carefully reviewed and in-

dependently weighed the evidence and reached the same conclusions of fact as did the District Court, and thereupon affirmed the findings made by the District Court. These findings of the lower courts are in strict conformity with official findings of the Engineers of the United States Army, who, in the discharge of their official duties, have repeatedly reported that New River is not navigable in fact at any point in its course.

Indeed, as to these issues, petitioner, in the Circuit Court of Appeals, in its own appraisal of the factual situation, conceded in effect that there could result no showing *clearly* to the contrary of the Court's findings. Thus, at page 268 of petitioner's supplemental brief in the Circuit Court of Appeals, it is said:

> "It cannot be said that the New River presents a '*clear* case' of navigability or non-navigability or that there is a '*clear* case' of absence of any effect on the interests of interstate or foreign commerce."

It is obvious, therefore, from the foregoing discussion that the findings, made by the District Court and affirmed by the Circuit Court of Appeals after an independent review of the evidence, cannot be said to be "*clearly* erroneous" (*United States* v. *Commercial Credit Co.*, 286 U. S. 63, 67) or "*plainly* without support" (*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178); and that there is an abundance of substantial evidence which supports them.

Inasmuch as these findings, concurred in by both lower courts, are supported by substantial evidence, they are not open to question in this Court.

Huston Oil Co. v. *Goodrich*, 245 U. S. 440, 441;

Brewer-Elliott Oil & Gas Co. v. *United States*, 260 U. S. 77;

Alabama Power Co. v. *Ickes*, 302 U. S. 464, 477.

Petitioner's statements, that the courts below, in reaching the conclusion that New River is non-navigable, "revised long settled rules as to the test of navigability" (Petition for a writ of certiorari, p. 16) and that "they introduced novel qualifications to the test of navigable waters" (Petitioner's Brief, p. 21), are squarely contrary to the fact. Actually both courts below followed the long settled test of navigability, which was laid down in the *Daniel Ball* case, 10 Wall. 557, and which has been consistently adhered to since that time. (23 F. Supp. 83, 98-99; 107 F. (2d) 769, 780).

Similarly petitioner's assertion that effect upon interstate commerce with reference to a project in non-navigable waters embraces beneficial effect upon navigable waters elsewhere (Petitioner's Brief pp. 100, 123) is without support in law. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31-32.

NON-NAVIGABILITY OF NEW RIVER

In the District Court petitioner contended that New River is a navigable water of the United States from its mouth, i.e., from its confluence with the Gauley River, up to the mouth of Wilson Creek near the Virginia-North Carolina line. The State of West Virginia is, of course, concerned with the question as to whether that portion of New River which lies within the boundaries of West Virginia is navigable or non-navigable. On this point the position of the State is clear. It insists that no part of the 90 mile long section of New River which is within the confines of West Virginia is navigable in fact, let alone being a navigable water of the United States.

Definition of Navigable Waters

We do not take space to discuss the rules for testing navigibility, which obviously have been correctly applied by both the District Court and the Circuit Court. However, we have noted that various of the reports of Government engineers, made upon or in connection with the respondent's declaration of intention, refer to the definition of "navigable waters" as contained in the Federal Water Power Act. It must be remembered that the decisions of the Supreme Court of the United States, defining navigable waters of the United States, such as *The Daniel Ball,* 10 Wall. 557, are interpretations, not of a statute, but of the commerce clause of the Federal Constitution, and, in this respect, merely an implied provision thereof (see *Leovy* v. *United States,* 177 U. S. 621, 633; 44 L. Ed. 914, 920; *United States* v. *Doughton,* 62 F. (2d) 936, 940).

That which is not navigable waters of the United States as defined by the Supreme Court of the United States cannot be made such by a statutory definition. This applies to the definition of "navigable waters" under Section 3 of the Federal Water Power Act, which definition embraces "such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement". Apropos this portion of the definition, it is noted that in *Oklahoma* v. *Texas,* 258 U. S. 574, this Court pointed out that the *failure of the attempted improvement* spoke louder than the attempted improvement in showing that the waters there under consideration were not navigable waters of the United States. No more then can Congress convert non-navigable sections of a river into navigable waters of the United States merely by calling such non-navigable sections "interrupting falls, shallows, or rapids." The

holding in *United States* v. *Utah*, 283 U. S. 64, shows that certain sections of a river may be navigable and others non-navigable, also that a section non-navigable in fact and in law and as short as 36 miles may intervene between sections which are navigable in fact and in law.

See *United States* v. *Cress*, 243 U. S. 316, 322; 61 L. Ed. 746, 751, wherein this Court states:

> "Many state courts, including the Court of Appeals of Kentucky, have held, also, that the legislature cannot, by simple declaration that a stream shall be a public highway, if in fact it be not navigable in its natural state, appropriate to public use the private rights therein without compensation. * * *
>
> "This court has followed the same line of distinction. * * *"

Apparently realizing the insuperable difficulty of demonstrating navigability in interstate commerce, the petitioner seeks without basis in fact, so we think, to impute navigability to limited intrastate stretches of the river and then, suggests (Petitioner's Brief, pp. 74-76) that, in case of a short intrastate portion of the stream, where some artificial improvement had locally been attempted, a short-lived, experimental use thereof, long since abandoned for transporting products which were subsequently carted from the river to the railroad, there to be reshipped to points outside the State, converts at least that portion of the river into a navigable water of the United States. We pause only to point out, *first*, that the rules determinative of navigable waters of the United States and used by the lower courts have already extended to the limit the implications of the commerce clause of the Constitution, without leaving room for such a conception as the petitioner here offers, and, *secondly*,

that, although the petitioner makes this suggestion with regard to the situation immediately above Radford, Virginia, yet the result of the validation in law of any such conception would be to plant isolated fragments of "navigable waters of the United States" all over West Virginia and the other States of the Union wherever a railroad is accessible for the shipment of products which have been transported by canoe or batteau or mountain-stream ferry-boat over intrastate stretches, however short. If such a conception were to receive serious consideration, we could envisage no limitation upon the commerce clause of the Constitution and no residue of power in West Virginia or any other State over any aspect of intrastate commerce.

The Actual Condition

The physical condition of the 90-mile long section of New River in West Virginia is fully described by the evidence in the record and may be characterized as a steep, bold, rough, mountainous stream forbidding any substantial or useful commerce, although, for a short distance above Hinton, West Virginia, a part of the West Virginia portion of the river was used to some extent after a considerable expenditure of money by the Federal Government in an effort to create navigability. There is not now, nor has there for many years been, any local or intrastate commercial use of New River in West Virginia, let alone any interstate use. Aware of the absurdity of its claim that New River is navigable from its mouth to Wilson Creek, near the North Carolina-Virginia line, the petitioner, in the Circuit Court of Appeals and here has limited its claim of navigability to the portion of New River between Allisonia, Virginia, and Hinton, West Virginia. In connection with that part of the river above Hinton, petitioner endeavors to create the impression that this constitutes navigable waters of the United

States by attempting to demonstrate that, once upon a time, there was a substantial use of the river across the Virginia-West Virginia state line. Incidentally, any contention of the petitioner that the state line crosses the New River at the upper end of Round Bottom is not conceded by the State of West Virginia, nor is it conceded that the state line either touches or enters New River at any point below Wiley Falls.

However, with regard to the main consideration, the record demonstrates that there were few, if any, trips across the state line and such trips, if they occurred at all, took place during temporary high-water and were insubstantial in character, and the testimony of such use is either hearsay or very unconvincing because of faulty recollection, inaccuracies and inconsistencies. Indeed to us of West Virginia any claim that any part of New River in West Virginia is navigable is little short of being ridiculous.

That the *petitioner itself does not take seriously its claim, that New River above Hinton is navigable,* is evidenced by the simple fact that Congress has authorized and the War Department is preparing to construct across New River, three or four miles above Hinton, West Virginia, the huge Bluestone Dam, without providing it with any locks or navigation facilities whatsoever.

ACTIONS OF THE STATE OF WEST VIRGINIA

In the Bill of Complaint it was averred that New River was recommended to Congress for improvement. Also, and without basis in fact, it was averred that New River has always been recognized and treated by the United States and the States of Virginia and West Virginia as navigable and that the State of West Virginia has always recognized the navigability of New River throughout its course in that State (par. 11 of bill of complaint, Record page 8).

To substantiate these claims with respect to West Virginia, petitioner at the trial of this action introduced in evidence the Joint Resolution adopted by the West Virginia Legislature on September 21, 1872. This resolution was the reincarnation of the idea of the Central Water Line Improvement which had died in its infancy years before. This resolution no more constituted recognition, legislative or otherwise, of the navigable capacity of the New and the Greenbrier Rivers than it did of the area of mountain-land over which the proposed canal, of this Central Water Line Improvement, would have extended.

However, it is deemed appropriate to bring to this Court's attention the fact that in a memorandum to the Federal Power Commission dated January 23, 1929, the Public Service Commission of West Virginia stated:

"* * * *

"II. That said Public Service Commission has * * * fully investigated among other things the following subjects * * *

"(1) Whether or not the said New River is a navigable stream, and, if so, in what respect the construction of the proposed works would affect the navigability of said river * * *.

"III. That such investigation resulted substantially in the following findings of fact:

"(1) That said New River *is not a navigable stream.*" (P. U. R., Vol. 1929-B, pp. 215-218.)

Moreover, the State of West Virginia, defendant by intervention in the case of *United States* v. *Electro-Metallurgical Co. et al.*, instituted in the District Court of the United States for the Southern District of West Virginia (In Equity No. 3398), in paragraph 6 of its answer filed therein

> "denies that New River from Wilson Creek, Virginia, to the Kanawha River in West Virginia, and particularly that part thereof embraced within the Hawk's Nest project, was in its natural condition or now is, either in fact or in law, navigable waters of the United States."

To summarize: Because of the physical facts patent alike upon the face of the record in this case and to the traveler passing along New River; in the light of the history of non-use of the river; and in view of the attitude and actions of the State of West Virginia, this State adheres firmly to its position that no part of New River within the boundaries of West Virginia is a navigable water of the United States. That position is supported by the findings of both lower courts. These findings are supported by substantial evidence and may not be disturbed.

WEST VIRGINIA'S POSITION REGARDING FEDERAL JURISDICTION UNDER POWER ACT

Whether the purpose of the relevant portions of the Power Act be to regulate and control water power developments, as petitioner in the Circuit Court admitted in the following language:

> "Thus the primary purpose of the legislation was the control of water power development, not of navigation" (Appellant's Supplemental Brief in C. C. A., p. 148),

or whether the purpose was to assert control only where (no Federal property being concerned) the interests of navigation are adversely affected, as was in effect held by the Circuit Court (107 F. [2d] 769, 793), seems to us, so far as the present case is concerned, to be immaterial.

Certainly under the admitted facts of this case we are dealing with a stream where no public land or other Federal property is involved and where the Federal Power Commission is seeking to exercise jurisdiction over a project which does not have the function of developing or improving navigation and which will not adversely affect the navigable capacity of any navigable waters of the United States.

Extent of Federal Jurisdiction Over Projects on Navigable Streams

West Virginia is of the view that, even if, contrary to the obvious facts, New River were a navigable water of the United States, then, subject to the Federal Government's right to protect its waters for the purposes of navigation, the States (not the Federal Government) would be absolute owners of the waters and the soil under them. This has been the law since the earliest days of this government. In *Martin* v. *Waddell*, 16 Peters 410, Chief Justice Taney said:

> "When the revolution took place the people of each State became themselves sovereign, and in that character held absolute right to all their navigable waters and the soils under them for their common use, subject only to the right since surrendered by the Constitution to the general government."

and in the case of *Pollard. Lessee* v. *Hagan*, 3 How. 212, 229, this Court, after quoting the above statement, said:

> "Then to Alabama belong the navigable waters and soils under them in controversy in this case, subject to the right surrendered by the Constitution to the United States, and no compact that might be made could diminish or enlarge these rights."

Hence, it is plain that, even if New River were navigable, the jurisdiction over it on the part of the Federal Government would be limited to the control thereof for the purposes of navigation. *Port of Seattle* v. *Oregon, etc., Company,* 255 U. S. 56.

West Virginia is also of the view that, even on interstate navigable streams, the State has the jurisdiction over the development of water power, except as to any power which may be incidentally created by *bona fide* navigation works of the Federal Government, and that the State may subject such development to such conditions and regulations as it may choose to prescribe, in so far as there is no interference with the control of the navigable waters, for purposes of protecting and fostering the navigation on, and navigable capacity of, such waters.

As stated by Senator Shields of Tennessee in the debates on this subject in the Senate:

> "The United States having no property in navigable streams, the Congress, as its agent, cannot constitutionally sell or lease the beds and waters of those streams for any purpose, its power being confined to the control of them for the purposes of navigation. When it attempts to do more, either directly or by coercion of the riparian owner, it is guilty of confiscation of private property." Congressional Record Vol. 53, Part 3, p. 2641.

and further:

> "These contentions are now conceded by some of the advocates of these Federal rents and royalties who are familiar with the authorities, and they have been driven to rest the power of Congress to compel the payment of them upon the proposition, as I understand it, that the United

States, through Congress, has the power to grant to the States and their grantees, permits necessary to authorize them to construct dams in navigable streams, and in exercising this power may impose such conditions as Congress deems proper.

"This must carry with it the assertion that this can be done, although the proposed structure will not obstruct but improve navigation, and the purpose of it be lawful and laudable, and the terms or conditions imposed are beyond the affirmative powers of Congress, and in direct violation of the express provisions of the Constitution.

"Mr. President, these are most astounding propositions of constitutional law and public policy, difficult to reconcile with the spirit and genius of constitutional government and the guaranties which it affords to the personal and property rights of a free people. Is it possible that Congress can by constructive force and duress usurp the sovereign powers of the States and confiscate the property held in trust for their citizens? Can the fundamental law be thus evaded and violated to force the States and their citizens to yield to an unlawful and unjust exaction under the penalty of being arbitrarily prohibited from the use and enjoyment of their property? The premises of this proposition are fallacious. The United States has no general police power over or proprietary rights in navigable waters to grant." Congressional Record, Vol. 54, Part 1, pp. 1007-8.

And as stated by Senator Nelson:

"If any compensation is to be made for the use of the water, it belongs to the states or to the riparian owners." Congressional Record, Vol. 58, Part 3, pp. 1040-1.

True, as petitioner states (Petitioner's Brief, p. 131), the Federal Government has the authority to forbid the

construction of a project on a navigable stream—although, contrary to petitioner's assertion, it has no such authority with respect to a project on a non-navigable stream (see page 17, 18 hereof)—nevertheless, the exercise of the power to regulate commerce by prohibiting structures in navigable streams may not be made the basis of exercising a non-federal power, i.e., of exacting, as a price of Federal consent for such structures, conditions unrelated to the protection of navigation. *First Employers Liability Cases*, 207 U. S. 463, 502; *Linder* v. *United States*, 268 U. S. 5, 17; *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, 593; *United States* v. *Chicago, etc., Railroad Co.*, 282 U. S. 311, 324; *United States* v. *Butler*, 297 U. S. 1. The only conditions that lawfully may be exacted are those related to the protection of navigation. *United States* v. *River Rouge Co.*, 269 U. S. 411, 419; *Wisconsin* v. *Illinois*, 278 U. S. 367, 415; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 340; *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed. 606, 613.

However, it is believed that the somewhat more detailed statement of the position of West Virginia in regard to the Power Act may more pertinently be directed to the question of Federal jurisdiction over a power project located on a non-navigable stream, such as New River actually is.

Extent of Federal Jurisdiction Over Projects on Non-Navigable Streams

In the present case the petitioner is attempting to go much further than was contemplated when the law was enacted, as is shown by such debates as that from which the immediate foregoing quotations are taken. The petitioner is here trying to establish a jurisdiction over *non-navigable waters* where no Federal property at all is involved. It is thereby seeking to deprive the States

and their citizens of the right to develop those waters under such rules and regulations as the States may choose to prescribe. The Federal Government possesses no jurisdiction or control within the State of West Virginia and her sister States over their respective non-navigable waters as such. The jurisdiction of the Federal Government under the commerce clause extends no further with respect to non-navigable waters than it does with respect to dry land or any other thing, substance, or subject (other than to commerce itself or to navigable waters). That is, in this respect the constitutional authority of the Federal Government is limited to prohibiting substantial interference with navigation on, or the navigable capacity of, navigable waters of the United States. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690; *United States* v. *Cress*, 243 U. S. 316. The State of West Virginia denies that the United States has any constitutional power to make water power developments upon the non-navigable streams of West Virginia illegal *per se* without a Federal license.

Petitioner's argument that it might have delegated its authority to build this project, located on a non-navigable stream, to an agent, viz., its licensee, and that consequently it could have exacted from that licensee such terms and conditions as it saw fit to impose, is predicated upon the false hypothesis that the Federal Government itself might have constructed "this very project" (Petioner's Brief, pp. 119-120).

The Federal Government has no authority whatsoever to build a power development (the Radford project is nothing other than a power development) on a navigable stream, let alone on a non-navigable stream such as New River.

Again Petitioner argues (Petitioner's Brief, pp. 130-131) that, because as it erroneously contends, it could

forbid altogether the construction of a project on a non-navigable stream, the Federal Government has authority to impose such license conditions as it sees fit for such a project. However, the Federal Government has neither licensing authority nor authority to forbid the construction of a project located on a non-navigable stream, its only authority on a non-navigable stream being to restrain such acts as impair the navigable capacity of a navigable stream. *United States* v. *Rio Grande Dam & Irrigation Co.*, supra. But, even if the Federal Government had licensing authority over projects on a non-navigable stream and authority to prohibit the construction of such projects, nevertheless, it would have no authority to impose for such projects license conditions which are unrelated to the protection of navigation, just as it may not do so even in the case of projects located on navigable streams (See p. 19 herein).

Petitioner's statement that Respondent's riparian rights go no further than the enjoyment of the natural flow of the stream and that the natural flow of a non-navigable stream may not be altered except on conditions specified by the Federal Government (Petitioner's Brief, p. 124, 136) presents a picture of relative State and Federal power that is decidedly out of focus. Whereas, on the one hand, the Federal power on a non-navigable stream is a limited power, that is, limited to restraining such acts as impair the navigable capacity of a navigable stream, on the other hand, the State's power is plenary.

So long as the State does not impair navigation and does not confiscate vested rights it has the full and complete sovereign power to adopt any law or orders which it deems best adapted to the development of its water resources and to the promotion of the welfare and prosperity of its people. *Kansas* v. *Colorado*, 206 U. S. 46,

94; *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 703; *Head* v. *Amoskeag Co.*, 113 U. S. 9.

Petitioner, entirely overlooking cases dealing squarely with the subject of interstate non-navigable waters, supports its view that the Federal Government has control over non-navigable waters merely because they may cross State lines, with cases on other subjects involving the admitted right of the Federal Government to regulate commerce and the channels of commerce (Petitioner's Brief, p. 126). However, these cases are not apropos of Petitioner's suggestion. Non-navigable waters are neither commerce nor channels of commerce and moreover this Court long ago squarely stated in connection with such view (viz., as contained in a Trial Court's instructions* to a Jury):

> "Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the States, and would subject the officers and agents of a State, engaged in constructing levees, to restrain overflowing rivers within their banks, or in regulating the channels of small streams for the purposes of internal commerce, to fine and imprisonment, unless permission be first obtained from the Secretary of War. If such were the necessary construction of the statutes here involved, their validity might well be questioned. But we do not so understand the legislation of Congress. When it is remembered that

* Concerning the Trial Court's instructions this Court said: "If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one State, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States. * * *"

> the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the States, it is obvious that what the Constitution and the acts of Congress have in view is the promotion of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes."

Petitioner's argument that it should be made a "central authority" (Petitioner's Brief, p. 116) having control of all uses of all streams and that the various uses of streams should not be left to the control of the "individual states" (Petitioner's Brief, p. 127) is a matter which, if it needs determination at all, should be submitted to the States, for constitutional amendment. It is not an issue appropriate for submission to a Court.

Conditions of Standard Form License

If and to the extent that the Federal Power Act is to be construed to require any conditions other than those which have a substantial relationship to the protection of navigation on navigable waters of the United States, the act is beyond the powers of the Federal Government.

The sovereign powers of the State are infringed by the conditions of the standard form of license which attempt to give the Federal Power Commission control over the plan for the improvement and development of a waterway, for the improvement and utilization of water power development, and for other beneficial uses including recreational purposes, particularly so when applied to non-navigable waters (Sec. 10-a). In the same category are those license conditions which specify: That the licensee shall maintain the project works in condition of repair adequate for efficient operation in the de-

velopment and transmission of power; that the licensee shall make necessary renewals and replacements, establish and maintain adequate depreciation reserves (determined by the Commission, not the State) for such purposes, and conform to such rules and regulations as the Commission (not the State) may prescribe for the protection of life, health and property (10-c); that the licensee shall, after the first twenty years, establish and maintain amortization reserves out of surplus earned in excess of a specified rate of return, such reserves to be, in the discretion of the Commission, held until the termination of the license or applied from time to time in reduction of the net investment, the rate of return and proportion of surplus earnings to be paid into such reserves being set forth in the license (10-d) i.e. to be determined by the Commission not by the State; that the licensee pay the United States an annual charge fixed by the Commission to reimburse the United States for the costs of administration, and that the licensee expropriate to the United States excess profits until the respective States shall make provision to prevent excess profits or for the expropriation thereof to themselves, or until the period of amortization is reached (10-e); that any licensee or any other project owner benefited by any licensee of a head-water improvement shall reimburse the latter for such part of the annual charges (for interest, maintenance and depreciation thereon) as the Commission concludes to be equitable, pay the United States the costs—as fixed by the Commission—of reaching such conclusion, and pay the United States similar charges when it makes any head-water improvement (10-f).

Section 14 provides for the so-called recapture or taking over of the project by the Federal Government at the end of the license, to be paid for at either the net investment, or fair value, whichever happens to be the lower, plus reasonable severance damages if any, and Section 15

permits the United States to issue a license which will enable another licensee to exercise its rights under Section 14. This net investment is defined in Section 3. It may be generally characterized as the actual legitimate original costs, plus additions and betterments, less certain unappropriated surpluses, balances of current depreciation of accounts, and aggregate appropriations of surplus or income held in amortization, sinking fund or similar reserves, or expended for additions or betterments, or used for the purposes for which such reserves were created where they were accumulated during the period of the license from earnings in excess of a fair return.

Such method of taking over amounts to the taking of property without just compensation. Not only is the sovereign power of the state usurped, but local enterprises may well be wrecked by such taking by the Federal Government and the consequent competition, and every water power in the State may well be found under the jurisdiction of the Power Commission and operated in a manner entirely subversive of the regulation by, and plan of, the State.

The imposition of such confiscatory conditions upon the development of water powers in West Virginia will necessarily defeat and nullify the policy of this State, which policy is to bring about such a development of its water resources as will promote its prosperity and increase its tax resources.

Section 19 permits regulation by the Federal Power Commission, in case the State has no such commission, of services, rates and security issues, regardless of whether the services, rates and security issues relate only to intrastate transactions.

Section 21 of the Act confers on the licensee the power of eminent domain to acquire what is necessary for the construction, maintenance or operation of any project, or

works appurtenant or accessory thereto, in conjunction "with an improvement which in the judgment of the Commission is desirable or justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce," and under this provision, regardless of the policy, plan or will of the State, public highways, schools, county seats and other public property can be acquired. (See what was done in *Missouri* v. *Union Electric Light & Power Company*, 42 F. [2d] 692, appeal dismissed on stipulation 53 F. [2d] 1080). Although the Federal Government's power of eminent domain is limited to what is necessary in the exercise of the granted powers, *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, nevertheless there is here attempted to be conferred through a bureau the *power to authorize the condemnation of anything whatsoever, provided only it is in conjunction with an improvement which the bureau regards as desirable or justified in the public interest.*

That these exercises of assumed power on the part of the Federal Government constitute a gross invasion of the rights of the State is borne out by the rule that the Commerce Clause, from which the power to improve navigable streams is implied, may not, upon the basis of indirect, remote or insubstantial relationships between the things sought to be controlled and interstate commerce, be extended to control matters within the State's jurisdiction. *Schechter Corp.* v. *United States*, 295 U. S. 495, 546; *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, 36-37.

In connection with this consideration of the license conditions sought to be imposed under the Federal Power Act, it is desired to point out that, whereas the discussion has been directed to the instant case where a water power project is located on a non-navigable stream, yet it is the view of West Virginia that the United States is equal-

ly impotent to impose upon a project in *navigable* waters of the United States license conditions such as that providing for the taking over of the project by the United States and other conditions which have no relationship to the protection of navigation. So long as no public land of the United States is involved, it seems clear that, whether a project be in navigable or in non-navigable waters, all pertinent Federal power stems from the same source, the Commerce Clause (involving as it does the protection of navigation), and that the limitations upon Federal control are fundamentally the same in both cases. Thus the resultant Constitutional limitations upon Federal authority in the premises differ only in the respect that, whereas the Federal Government has no constitutional authority to require a Federal license at all for a project located on a non-navigable stream and duly authorized by State law, the Federal Government does have constitutional authority to require a license for a project on a navigable water of the United States so long as the conditions sought to be imposed by that license have a real and *bona fide* relation to the protection* of navigable capacity.

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* In fact, with respect to projects on non-navigable streams the Federal Power Commission itself, at one stage of its history, seemed to recognize a principle definitely at variance with that of petitioner at the present time, for, in connection with its explanatory statement concerning the obtaining of an opinion of the Attorney General of the United States with regard to eliminating certain license conditions (by means of a so-called minor-part license), there appears the following:

> "It is possible that licenses restricted to the terms essential for safeguarding the navigation interests will serve the essential Federal interests and at the same time overcome the objections advanced by the States. The control over projects of this class is fundamentally a function of the States, and it seems appropriate that the Federal relationship should be conformably subordinated to an extent consistent with the protection of recognized Federal interests." 10th Annual Report of the Federal Power Commission, 1930, p. 8, 9.

The fact that the standard form license contains various conditions which have no relation to the protection of navigation need not be stressed. *It is frankly conceded by petitioner* (see petitioner's brief, p. 128).

In the foregoing, the license conditions sought to be imposed under the Federal Power Act have been considered from the standpoint of their imposition upon a private citizen or private corporation. The utter invalidity, not to say iniquity, of many of those conditions stands out the more clearly when considered in view of the fact that they would apply also in the cases of any water power development made by West Virginia itself. It appears from Sections 4 (e) and 23 (b) of the Act that States and municipalities, like private citizens and corporations, are purportedly subject to the necessity of obtaining licenses. Purportedly a State too must come to the Federal Power Commission as a suppliant.

Under Section 7 (a) an application by a State or municipality has priority over an application by a private party; but, once a license has been issued, there appears to be no difference in the obligations of, or conditions imposed upon, a State or municipality as a licensee as compared with the obligations and conditions resting or imposed upon private licensees, excepting apparently only as regards the payment of annual charges under certain conditions. Under Section 14 the alleged right of petitioner to take over the entire project would apply equally if the licensee were a State.

It is not suggested that in principle the invasion of the rights of the State is any greater if the State be a licensee than if the licensee be one of its citizens and the property rights involved be those granted by the State instead of property rights still retained by the State. Nevertheless the extent to which the Power Act, or at least petitioner's interpretation thereof, conflicts with the fundamental law

of the land, as set forth in the Constitution, is the more glaringly revealed when one considers that under the provisions of the Act such claims as those which petitioner makes would apply as well if the project were that of a State.

Thus it is claimed (petitioner's brief, pages 128-131), first, that *even on a non-navigable stream* the Federal government "has power to forbid the construction or operation of a project" (p. 129; cf. p. 131) and, secondly, that therefore petitioner may impose conditions "which do not relate to the protection of navigation, but instead seek to assure conservation and regulation of the use of water resources and to permit ultimate recapture of the project by the United States." (p. 128; cf. p. 131). Clearly petitioner claims the right to regulate water resources for all kinds of uses, including power, irrigation, etc.; and the language used contains the implication that the United States would merely be taking back the project.

The State of West Virginia insists that such claims of petitioner are completely outside Federal authority under the Constitution.

Profound Importance of the Questions in This Case With Respect to the States' Control and Management of Their Own Internal Affairs

The principle of States' rights lies at the very foundation of our Federal system of Government. Despite the fact that expediency has tended to overshadow the principle of federalism, nevertheless the latter principle is as important today as at any stage in our history. Consequently, the situation which exists today is one to occasion grave concern to those who believe in the continuance of our Constitutional division of Government between State and Nation and who believe that the main-

tenance of the authority of the States over their internal affairs is as necessary to the preservation of our system of Government as is the maintenance of the authority of the National Government over the matters entrusted to the Nation by the Federal Constitution.

If the Federal Government may, particularly on non-navigable streams, prohibit water power developments except on condition that the developer submit to a Federal license containing the conditions, unnecessary for the protection of navigation, which petitioner herein is seeking to impose, then there is no reason why the same Federal license conditions may not be imposed in practically every other field of business.

Stated differently, if these license conditions, unnecessary for the protection of navigation, may be imposed upon water power projects and the generation of electricity, neither of which is commerce between the States, then there is established a principle that would make all manufacturing industries — indeed every conceivable business and undertaking which is a producer of goods — subject to the imposition of a Federal license containing like conditions (for the taking over of the business by the Federal Government) for the mere reason that its produce might enter into commerce between the States. Surely that would be an astounding principle of Constitutional law. Indeed, such a principle would make available to the National Government the power to control the States and their citizens to an undreamed-of extent. Surely the preservation of powers reserved to the States is vital to the continued existence of our dual form of Government—a form of Government so well adapted to conditions and political ideas at the time it was established that it won the admiration and emulation of statesmen everywhere, and one which, we submit, is so well adapted to present-day needs that any change from it is

beyond serious thought. If, then, our form of Government—

> "an indestructible Union, composed of *indestructible States*", (*Texas* v. *White*, 7 Wall. 700, 725)—

is not to be supplanted by some form of totalitarian state, the rights of the States, not only deserve but, must receive a better fate than merely lip service.

CONCLUSION

Unless the decree of the District Court is affirmed, the established policy of the State of West Virginia for the development of her water resources will be seriously threatened, if not completely thwarted. The full preservation of the constitutional power of the State to adopt such policy as it may from time to time see fit for the development of its water resources, and for the interests, health and general welfare of her people, is of the greatest importance and one of its sovereign prerogatives; and, unless this Federal effort to control the development of internal resources is resisted and denied, the State will be deprived of vital power in regulating matters of domestic concern having no real and substantial relation to commerce.

For the foregoing reasons, resting upon fundamental principles underlying our dual system of Government, the decree below should be affirmed.

Respectfully submitted.

—CLARENCE W. MEADOWS,
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